STATE OF MICHIGAN

COURT OF APPEALS

YVONNE RUSSELL,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 256756
Wayne Circuit Court
LC No. 03-313406-NO

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from the order denying its motion for summary disposition in this premises liability case involving governmental immunity. On appeal, defendant argues that it is entitled to summary disposition because plaintiff failed to present evidence establishing a cause of action in avoidance of governmental immunity and because plaintiff failed to present evidence establishing breach of duty and causation. We reverse.

Plaintiff brought suit against defendant under the highway exception to governmental immunity, MCL 691.1402(1), after she tripped and fell on a Detroit sidewalk and sustained injuries during the course of her employment as a mail carrier. Defendant asserts that it was entitled to summary disposition because plaintiff failed to present evidence raising an issue of fact that a defect in the sidewalk caused her fall. We agree.

A decision with regard to a motion for summary disposition is reviewed de novo on appeal. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Determination of the applicability of the highway exception is a question of law that this Court also reviews de novo. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000). Defendant filed its motion for summary disposition under MCR 2.116(C)(7) and (C)(8). In its supplemental brief in support of its motion for summary disposition, defendant additionally argued for dismissal under MCR 2.116(C)(10). Because MCR 2.116(C)(7) is the appropriate subsection under which to bring a motion for summary disposition based on governmental immunity, *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997), and because both parties submitted documentary evidence that is not relevant to a motion brought under MCR 2.116(C)(8) but is

relevant to a motion brought under MCR 2.116(C)(10), this Court will analyze the motion under MCR 2.116(C)(7) and MCR 2.116(C)(10). See, generally, *Dampier v Wayne Co,* 233 Mich App 714, 720; 592 NW2d 809 (1999).[1]

When reviewing a motion for summary disposition based on governmental immunity, this Court considers all documentary evidence submitted by the parties. *Id*. Well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Id.* A plaintiff must allege facts warranting application of an exception to governmental immunity to survive a motion for summary disposition under MCR 2.116(C)(7). *Dampier, supra* at 720. In reviewing a motion for summary disposition under MCR 2.116(C)(10), summary disposition may be granted if a review of the evidence demonstrates that there is no genuine issue of material fact and the nonmoving party is entitled to judgment as a matter of law. *Haliw v City of Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001).

The highway exception to governmental immunity is set forth in MCL 691.1402(1), which provides in part:

> [E]ach governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . .

The exception generally applies to the state, counties, and municipalities. *Michonski v Detroit*, 162 Mich App 485, 492; 413 NW2d 438 (1987). "Highway" is defined to include "sidewalks." MCL 691.1401(e).

Asserting that an action falls within the "highway exception" does not end the analysis regarding whether a governmental agency, in this case a municipality, is liable for an injury that occurred on premises within its jurisdiction. *Haliw, supra* at 304. "First, it must be determined whether the plaintiff has pleaded a cause of action in avoidance of governmental immunity." *Id.* Second, even if the plaintiff alleges that the injury occurred in a location encompassed by MCL 691.1402(1), the plaintiff must still prove negligence. *Id.* "To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power*

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[1] We reject plaintiff's argument that the MCR 2.116(C)(10) issue was not properly before the trial court and is not properly before this Court because defendant did not raise it in its initial summary disposition motion but instead raised it in a supplemental brief filed shortly before the motion hearing. First, we find nothing in the record indicating that plaintiff objected to defendant's raising the issue in its supplemental brief. Moreover, defendant did state in its initial motion that "there is no genuine issue as to any material fact," and after it obtained plaintiff's deposition testimony, which was not available at the time of the initial motion, it expanded on this concept in the supplemental brief.

Co, 463 Mich 1, 6; 615 NW2d 17 (2000). Proof of causation requires both cause in fact and proximate cause. *Haliw, supra* at 310. "Cause in fact requires that the harmful result would not have come about but for the negligent conduct." *Id.* Cause in fact may be established by circumstantial evidence, but such proof must rest on reasonable inferences and not mere speculation. *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994); *Meek, supra* at 119. Evidence of causation is sufficient if the jury may conclude that, more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred, even if other plausible theories have evidentiary support. *Wilson v Alpena County Rd Comm*, 263 Mich App 141, 150; 687 NW2d 380 (2004). An explanation that is consistent with known facts but not deducible from them is impermissible conjecture. *Skinner, supra* at 164; *Karbel v Comerica Bank*, 247 Mich App 90, 98; 635 NW2d 69 (2001). Normally, the existence of cause in fact is a question for the jury to decide, but if there is no issue of material fact, the question may be decided by the court. *Holton v A+ Ins Associates, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003).

Plaintiff failed to come forward with evidence linking her fall with a defect in the sidewalk. At her deposition, plaintiff stated that she walked down the walkway of a house on her route, made a right turn onto the sidewalk, tripped on the sidewalk, and fell. Plaintiff could not say whether she was in the middle of the sidewalk or closer to the lawn or closer to the berm when she fell. When shown photographs of the sidewalk in front of the house identified by plaintiff as the general location of her fall, plaintiff was unable to identify where on the sidewalk she had fallen, stating that she would have to study the pictures and could not give an answer.

This case is analogous to *Stefan v White*, 76 Mich App 654, 656; 257 NW2d 206 (1977), in which the plaintiff filed a premises liability claim after she fell in the defendant's home. At her deposition, the plaintiff stated that she did not know what caused her to fall. *Id.* at 657. The plaintiff's husband provided an affidavit stating that he observed a metal strip protruding from the edge of the kitchen floor. *Id.* at 657-658. This Court affirmed the grant of summary disposition to the defendant, stating that the plaintiff's case was based on conjecture. *Id.* at 661. The Court stated that "[t]he mere occurrence of plaintiff's fall is not enough to raise an inference of negligence on the part of defendant." *Id.*

As in *Stefan*, plaintiff testified that she fell, but she was unable to identify where she fell and she did not identify what caused her to fall. In her complaint, she stated that the raised sidewalk in front of the house caused her to fall, but in her deposition testimony she could not give a precise answer about the location of her fall, and the cause of her fall, whether it was a defective sidewalk that was tipped or sunken, or the natural accumulation of snow and ice, remains unknown. As in *Stefan*, the state of the sidewalk was a possible cause of her fall, but there is nothing, besides conjecture, linking the condition of the sidewalk with her fall. The trial court therefore erred in denying defendant's motion for summary disposition.

Defendant raises four other issues on appeal: whether plaintiff came forward with sufficient evidence to raise an issue of fact regarding the defective condition of the sidewalk, whether plaintiff came forward with sufficient evidence to raise an issue of fact regarding defendant's notice of the defective condition, whether plaintiff came forward with sufficient evidence to raise an issue of fact regarding the unnatural nature of the accumulation of ice and snow on the sidewalk, and whether defendant was entitled to summary disposition because plaintiff failed to serve defendant with a post-injury notice of the defect in the sidewalk and of

her injuries as required by MCL 691.1404(1). Because we find that defendant is entitled to judgment on the issue of causation, we need not address these issues.

Reversed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens